No. 91-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

vs.

RENE ALBERTO RODRIGUEZ, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

THOMAS RICHICHI
Counsel of Record
ALBERT J. BEVERIDGE, III
KATHRYN E. SZMUSZKOVICZ
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Washington, D.C. 20005
Telephone: (202) 789-6000

JOSÉ LUIS NOVAS-DUEÑO
Suite 530, Bolivia 33 Building
Hato Rey, Puerto Rico 00917
Telephone: (809) 754-8300
Counsel for Petitioner

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CERTIORARI GRANTED NOVEMBER 12, 1991

QUESTION PRESENTED

Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

LIST OF PARTIES AND RULE 29 LIST

The appellant in the case below is the petitioner herein, PFZ Properties, Inc. ("PFZ"). PFZ was the plaintiff in the District Court action from which the appeal was taken.

The appellees in the case below are the respondents herein and include:

(1) René A. Rodriguez, in his individual capacity;

(2) Salvador Arana, in his capacity as Administrator of the Regulations and Permits Authority of the Commonwealth of Puerto Rico; and

(3) the Regulations and Permits Authority of the Commonwealth of Puerto Rico.

Petitioner PFZ Properties, Inc. is a privately held corporation and has no publicly owned parent, subsidiary or affiliate.

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit ("Court of Appeals") is reported in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted in part*, ___ U.S. ___, 60 U.S.L.W. 3359 (1991), and is reprinted in the Joint Appendix at 502. The order of the Court of Appeals denying rehearing is not reported. That order is reprinted in the Joint Appendix at 513. The Court of Appeals affirmed the decision of the United States District Court for the District of Puerto Rico ("the District Court") in *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67 (D.P.R. 1990). The District Court's opinion and order is reprinted in the Joint Appendix at 479 (hereinafter "JA at ___").

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Court of Appeals affirming the dismissal by the District Court of claims made by petitioner arising under the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on March 18, 1991. Petitioner's request for a rehearing by the Court of Appeals was denied in an order entered on April 23, 1991. This Court granted PFZ's petition for a writ of certiorari on November 12, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns petitioner's attempts to vindicate its rights to due process under the United States Constitution. The constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved in the case is 42 U.S.C. § 1983. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

I. STATEMENT OF THE CASE

A. Procedural History

This case arises out of a dispute over the development of a large residential and tourist project in an area known as Vacía Talega in the Commonwealth of Puerto Rico. Petitioner's complaint was filed in December 1987 in the District Court under 42 U.S.C. § 1983. An amended complaint was filed in October 1988. It alleged, *inter alia*, that the respondents René Rodriguez and the Regulations and Permits Authority of the Commonwealth of Puerto Rico ("ARPE" or "the Agency") had violated petitioner's right to substantive due process under the Fourteenth Amendment.[1] This claim arose from alleged deliberate misconduct by ARPE and Rodriguez, the former Administrator of ARPE. Accordingly,

[1] JA at 131-39.

Rodriguez was sued in his individual capacity. Because injunctive relief was sought from ARPE, the current Administrator of the Agency, Salvador Arana, was sued in his official capacity.

Discovery was completed and the final pretrial order was entered in December 1989. Following the entry of the same, the District Court granted a motion to dismiss the amended complaint pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim. PFZ filed a timely appeal. The Court of Appeals affirmed the dismissal on March 18, 1991. Petitioner sought a rehearing, which request was denied on April 23, 1991. This Court granted PFZ's petition for a writ of certiorari on November 12, 1991.

B. Facts Material to the Question Presented

PFZ owns a large tract of land in Puerto Rico in an area known as Vacía Talega, which it purchased in 1960. In May 1976, the Planning Board of Puerto Rico ("Planning Board") adopted a resolution approving a development project for this parcel, which first had been proposed by PFZ in 1970. The Planning Board is the Commonwealth agency which has discretionary authority to make site-specific land use policy decisions in Puerto Rico. According to the resolution approving the project, development was to proceed in two sequential phases, the first of which was to include approximately 500 hotel rooms, 1,952 residential apartment units, and 1,104 condo-hotel apartment units.

Controversy surrounding the project led to a challenge of the Planning Board approval in the Puerto Rican courts. The Superior Court of Puerto Rico affirmed the Planning Board's resolution in September 1977. In January 1978, the Supreme Court of Puerto Rico declined to review the Superior Court's decision.

PFZ thereupon timely submitted plans for the development of the first phase of the project to ARPE, another agency

of the Puerto Rican government. ARPE approves development plans consistent with Planning Board resolutions. It also issues construction permits based upon construction drawings submitted by developers consistent with approved development plans. ARPE's permit issuing functions are ministerial in nature.

In February 1981, ARPE approved PFZ's development plans by formal resolution. Pursuant to that resolution, in February 1982, PFZ timely filed construction drawings with ARPE for the first section of the project. This triggered ARPE's statutory duty to process the drawings by performing a technical review of them and issuing a construction permit. In March 1982, ARPE confirmed to PFZ in writing that it had received the required construction drawings and that it had sent the drawings to a regional office for processing.

Over the next several years, PFZ inquired regularly about the status of ARPE's review. At no time was PFZ advised that there were any deficiencies in the drawings. By the end of 1985, however, PFZ had yet to receive any technical feedback on its drawings.[2] PFZ therefore made a direct inquiry in January 1986 to the new Administrator of ARPE, Lionel Motta. Motta responded by ordering his subordinates to investigate the matter.

As a result of that investigation, and consistent with ARPE's ordinary procedures, a letter officially notifying PFZ of the status of its drawings and additional information required to complete their processing was prepared and signed by Motta on behalf of ARPE in February 1987. Motta retired two days later. His subordinates, however, never sent the notice letter to PFZ or notified PFZ of the action taken.

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[2] By ARPE custom, practice and procedure, construction drawings were processed to conclusion through a back-and-forth technical exchange of comments and revisions between the proponent's engineers and ARPE technicians.

Motta was succeeded by the Deputy Administrator, respondent René Rodriguez, who became Acting Administrator. As a political appointee, Rodriguez served at the pleasure of the Governor.[3] In the wake of Motta's retirement, Rodriguez and his senior deputies embarked upon a deliberate, orchestrated course of conduct intended to delay indefinitely the processing of PFZ's drawings and the issuance of the construction permit. During the remainder of 1987, these senior ARPE officials, acting under the personal direction of Rodriguez, prevented the processing of PFZ's drawings and refused to respond to written and verbal inquiries regarding their status. Consistent with this conduct, when Rodriguez was advised of the existence of the February 1987 notice letter, he ordered a senior deputy to remove it from the project file and give it to his secretary to conceal in a locked file cabinet to which only she and Rodriguez had access.[4]

In December 1987, the president of PFZ met privately in the Governor's offices with Amadeo Francis, a Special Advisor to the Governor of Puerto Rico. Although Francis had no official responsibilities with respect to ARPE functions, PFZ was advised that he was "handling" the Vacía Talega matter.[5] At the meeting, Francis advised PFZ that the Governor previously had decided to keep the development

[3] Rodriguez was appointed Administrator later that year.

[4] The existence of the notice letter was not discovered by PFZ until the deposition of René Rodriguez in June 1989. Its contents were not revealed until a copy was produced by ARPE just before the close of discovery in November 1989. In his deposition, Rodriguez acknowledged that the execution of the letter was an official act, which should have been carried out. The letter is discussed in the District Court opinion. JA at 482-83.

[5] In fact, unbeknownst to PFZ, Francis had been selected by the Governor to chair an ad hoc interagency group to handle Vacía Talega. *See* JA at 78-81.

from going forward for personal, political reasons, and that the project would not be resolved on the merits.[6]

This was wholly inconsistent with the legal status of the project. The Planning Board had approved the project and had recently confirmed its approved status. The ARPE Administrator had presented a written report to the Puerto Rican Senate in October of 1986 confirming ARPE's understanding to the same effect. The matter was thus beyond any stage of policy review, and the only legitimate inquiry for ARPE was into the technical merits of drawings submitted for processing.[7]

Based on Francis' disclosure and the continued stonewalling by ARPE, PFZ filed its original complaint in the District Court on December 28, 1987. The complaint alleged that ARPE's continued refusal to process the construction drawings and issue the associated permits constituted a violation of PFZ's rights to substantive due process.

In August 1988, PFZ was informed by ARPE that it would not receive a construction permit and that its case was being dismissed. ARPE also advised PFZ that, as a result of ARPE's dismissal, the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect. The decision ostensibly was premised on a finding that PFZ had never submitted any "construction drawings." This was a pretext. Senior ARPE officials, including the Deputy Administrator and the Assistant Administrator for Regional Operations, acting on instructions from Administrator Rodriguez,

[6] Respondents have acknowledged that the meeting alleged in the amended complaint occurred and that there was a discussion of a number of items with respect to the project. *See* Opposition to Petition for Certiorari at 10.

[7] As respondent Rodriguez had advised Francis in correspondence several days before Francis' December meeting with PFZ's president, ARPE did not have authority to establish public land use policy. That authority rested with the Planning Board. *See* JA at 87.

had conducted a sham review in which they deliberately reviewed the wrong drawings. As was alleged in the amended complaint and is now admitted by respondents, the actual construction drawings submitted by PFZ were never reviewed.[8]

Having reviewed the wrong drawings, respondents "concluded" that the construction drawings had never been submitted, so no permit could issue. It also was determined that the decision to deny the project would be made without notifying PFZ's engineers of any deficiencies and without providing any opportunity to correct the same.[9]

PFZ requested reconsideration of the decision. Administrator Rodriguez personally directed the reconsideration and responded on behalf of ARPE, denying the request. PFZ petitioned for review of ARPE's decision in the Superior Court and Supreme Court of Puerto Rico. Review in both courts was discretionary and, if granted, was limited by statute exclusively to issues of law.[10] The petitions for review were denied by the Puerto Rican courts.

PFZ filed its amended complaint in federal district court in October 1988, alleging that the respondents' deliberate misconduct in denying the project and continuing to refuse to process the actual construction drawings which had been submitted deprived PFZ, *inter alia*, of its rights to substantive due process under the Fourteenth Amendment to the United States Constitution. At the completion of discovery, respondents moved to dismiss the amended complaint.

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[8] Respondents admit that the wrong drawings were reviewed, but assert that it was unintended. *See, e.g.*, Opposition to Petition for Certiorari at 11 n.13. Petitioner alleged respondents' actions were deliberate. It would be impossible to confuse the drawings that were "reviewed" with the construction drawings submitted by PFZ.

[9] This decision was inconsistent with customary ARPE practice and procedure. *See* n.2, *supra* at 5.

[10] *See* 23 L.P.R.A. §72d (Appendix to Petition for Certiorari at A-28).

The District Court granted respondents' motion to dismiss. It held that PFZ had failed to state a claim for violation of its rights to substantive due process, in light of the view repeatedly expressed by the First Circuit that controversies involving rejections of land development projects and denials of construction permits do not rise to the level of substantive due process violations.[11] The Court of Appeals affirmed on essentially the same grounds. On November 12, 1991, this Court granted the petition for a writ of certiorari with respect to the substantive due process claim raised by PFZ.

II. SUMMARY OF THE ARGUMENT

The Due Process Clause of the Fourteenth Amendment contains a substantive component which protects individuals from arbitrary state action. The Supreme Court has recognized that a property owner's right to devote its land to a legitimate use is protected from such arbitrary state action by the Due Process Clause. In such cases, the courts recognize a claim for substantive due process if the denial of a land use or construction permit was the result of arbitrary or illegal state action which bears no rational relationship to a legitimate state purpose.

Petitioner's amended complaint alleged that the respondents violated its rights to substantive due process when ARPE, acting at the direction of Rodriguez, arbitrarily, capriciously and illegally dismissed its project. ARPE's dismissal was premised upon a deliberate review of the wrong drawings, conduct which PFZ claims was arbitrary and capricious.

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[11] As to PFZ's other claims, the District Court held that the post-deprivation administrative and judicial process afforded to PFZ under Puerto Rico law was constitutionally sufficient for purposes of procedural due process. It also held that PFZ's right to equal protection was not violated, even though PFZ was treated differently from other permit applicants, and even though respondents disregarded administrative procedures and denied PFZ's permit for reasons illegitimate under state law.

The purpose of this arbitrary conduct was to prevent the processing of PFZ's construction drawings and thus, to prevent PFZ from pursuing a legitimate use of its property. It bore no rational relationship to a legitimate state objective. The petitioner therefore stated a cognizable substantive due process claim.

The court below found that a violation of PFZ's substantive due process rights had not been alleged and dismissed the appeal. In doing so, it ignored this Court's recognition that the legitimate use of private property is a protected constitutional right. Moreover, it applied an approach that effectively forecloses the protection of a legitimate use even if the state action is arbitrary, capricious and for illegal reasons, unless the improper motivation is accompanied by the deprivation of a specific, *i.e.*, a fundamental, constitutional right or invidious, class-based discrimination.

Neither the Supreme Court nor a majority of the federal circuit courts have imposed such a restrictive interpretation on the Fourteenth Amendment. In contrast to the First Circuit's approach, a majority of the circuits recognize the right to pursue a substantive due process claim with respect to the arbitrary denial of a construction permit where the denial was not the product of a rational attempt to achieve a legitimate state objective. This approach is consistent with Supreme Court precedent, and has proven workable and manageable in the lower courts.

III. ARGUMENT

A. The Due Process Clause

1. The Basis for Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." This provision has been interpreted by the Court to encompass three types of

claims arising under the Due Process Clause that may be brought under § 1983.[12] *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990). First, the Due Process Clause incorporates many of the specific protections defined in the Bill of Rights. *Id.* For example, a plaintiff may bring an action under § 1983 alleging a state official's violation of his rights to freedom of speech or freedom from unreasonable searches and seizures. *Id.*[13] When implicated by the allegations in a complaint, the specific constitutional protection in the Bill of Rights which has been asserted serves as the guide for analyzing the claim. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1870-71 (1989) (citations omitted).

Second, the Due Process Clause encompasses a guarantee of fair procedure. Thus, a § 1983 action may be brought to remedy a deprivation of life, liberty or property which occurs in violation of procedural due process. *Zinermon v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983. Such claims are evaluated on the basis of what process the state provides, and whether that process is itself constitutionally adequate. *Id.*[14]

Finally, the Due Process Clause includes a substantive component which bars certain "arbitrary, wrongful" government actions, "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. at

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[12] Section " '1983 is not itself a source of substantive rights,' " but rather "provides 'a method for vindicating federal rights elsewhere conferred.' " *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870 (1989), *quoting Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

[13] *See generally Daniels v. Williams*, 474 U.S. 327, 337 & nn.4-6 (1986) (Stevens, J., concurring) (discussing incorporation and specific protections in Bill of Rights which are incorporated). The Due Process Clause incorporates those Amendments which are "implicit in the concept of ordered liberty." *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937). PFZ's claim is not premised on an asserted violation of any specifically incorporated protection in the Bill of Rights.

[14] The Court did not grant certiorari with respect to PFZ's procedural due process claims; this discussion is solely for purposes of completeness.

125, 110 S. Ct. at 983, *quoting Daniels v. Williams*, 474 U.S. at 331.[15] *See also Graham v. Connor*, 490 U.S. at 395, 109 S. Ct. at 1871 (distinguishing claims based on those Amendments in the Bill of Rights which have been incorporated into the Fourteenth Amendment from constitutional claims based on "the more generalized notion of 'substantive due process' "); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (Due Process Clause not "limited by the precise terms of the specific guarantees elsewhere provided in the Constitution," but operates on a "rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints") (citations omitted).

The recognition of this substantive component reflects the traditional and common sense notion that the Due Process Clause, like its forebear in the Magna Carta "was 'intended to secure the individual from the arbitrary exercise of the powers of government. . . . ' " *Daniels v. Williams*, 474 U.S. at 331 (citations omitted). By recognizing that the "touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), *citing Dent v. West Virginia*, 129 U.S. 114, 123-24 (1889), the Fourteenth Amendment serves to prevent the state from abusing its power or employing it as an instrument of abuse. *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986), *citing Daniels v. Williams*, 474 U.S. at 331-33. *See also Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926) (substantive due process protects against state action which is "arbitrary or unreasonable"); *Village of Arlington Heights v. Metro Housing Dev.*, 429 U.S. 252, 263 (1977) (Due Process Clause protects right to be free from "arbitrary or irrational" state action).

[15] For discussion purposes, the order of the second and third types of claims discussed in *Zinermon* has been reversed.

2. Fundamental Rights

The Court has articulated two distinct approaches when reviewing substantive due process claims that implicate rights not specifically enumerated in the Bill of Rights.[16] The first approach pertains to those rights which the Court has specifically identified as "fundamental rights."[17] Such fundamental rights are variously described as those "implicit in the concept of ordered liberty,"[18] or those that are "deeply rooted in this Nation's history and tradition." *See* discussion and cases cited in *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). They find their source implicitly in various provisions of the Constitution or in liberty interests protected by the

[16] With respect to enumerated rights, *see Graham v. Connor*, 490 U.S. at 393-95, 109 S. Ct. at 1870-72.

[17] Petitioner did not argue that it was deprived of a fundamental right. Nonetheless, the First Circuit discussed PFZ's case in the context of two prior First Circuit decisions which had framed the analysis of due process claims related to land use permits in such terms. *See PFZ Properties, Inc. v. Rodriguez*, 928 F.2d at 31, *citing Chiplin Enters., Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) and *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982). The cited cases expressed the view that a right to be free from the arbitrary denial of a permit in the land use context does not exist absent the accompaniment of a fundamental right or invidious, class-based discrimination. PFZ's protected right need not be a "fundamental" right in order to be a right protected by the Due Process Clause. *See* discussion, *infra* at 14-15.

[18] *Cf.* n.13, *supra* at 11. Specific protections incorporated from the Bill of Rights are sometimes discussed in the same general terms.

Due Process Clause.[19] Fundamental rights include, for example, freedom of association,[20] the right to vote and to participate in the electoral process,[21] the right to interstate travel,[22] and the right to privacy.[23]

The Court affords fundamental rights extraordinary judicial protection. *Bowers v. Hardwick*, 478 U.S. at 191-92. Before government can interfere with "fundamental rights," it must demonstrate (1) the existence of a compelling state interest and (2) that there are no less restrictive alternatives. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing fundamental right to marital privacy).

3. Other Protected Rights — The Right to Devote Private Property to a Legitimate Use

The rights protected by substantive due process are not limited solely to fundamental rights. The Due Process Clause protects against the deprivation of other rights implicating "life, liberty, or property," as well. Thus, within the context of substantive due process, this Court has expressly recognized that the right of a landowner "to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington, ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928). As such, the power of a state to interfere with general rights of a landowner by restricting the character of the use of his property is limited by the Due Process Clause. *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928). States may not impose restrictions

[19] *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965). *See also id.* at 488-93, 496 (Goldberg, J., concurring) (discussing Ninth Amendment).

[20] *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

[21] *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

[22] *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[23] *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971) (marital decisions); *Loving v. Virginia*, 388 U.S. 1 (1967) (marital decisions); *Roe v. Wade*, 410 U.S. 113 (1973) (child bearing).

that are "unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *State of Washington*, 278 U.S. at 121.

This recognition that the substantive component of the Due Process Clause protects the right of a landowner to devote his land to legitimate use is reflected in numerous decisions of the Court. *See Village of Arlington Heights v. Metro Housing Dev.*, 429 U.S. at 263; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Nectow v. City of Cambridge*, 277 U.S. at 187-88; *Village of Euclid v. Amber Realty Co.*, 272 U.S. at 395. These decisions underscore the importance which the Constitution attaches to traditional property rights. As the Court has stated, the "dichotomy between personal liberties and property rights is a false one."[24] *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). "In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Id. See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("[T]he *right* to build on one's own property — even though its exercise can be subjected to *legitimate* permitting requirements — cannot remotely be described as a 'governmental benefit' " (emphasis added).

The Court also has addressed the standard of review to be applied to government conduct related to interference with the legitimate use of a landowner's property. Because the right to use one's own property has not been recognized as a "fundamental right," strict scrutiny is not employed. Instead,

[24] As Justice Brennan has noted, if "a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan J., dissenting). *See also id.* at 633-34 (Rehnquist, J., concurring) ("If I were satisfied [that the jurisdictional requirements had been met], I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice BRENNAN.")

where the use of private property or the pursuit of useful activities with respect to private property is at issue, the Court has articulated a traditional due process standard. To establish a violation of substantive due process, a plaintiff must demonstrate that the government's action was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[25] *Village of Euclid v. Amber Realty Co.*, 272 U.S. at 395. *See also Nectow v. City of Cambridge*, 277 U.S. at 187-89; *Village of Arlington Heights v. Metro Housing Dev.*, 429 U.S. at 263; *Village of Belle Terre v. Boraas*, 416 U.S. at 8 (*reaffirming Euclid*, 416 U.S. at 3-5).

Virtually all of the federal circuit courts which have addressed substantive due process with respect to the denial of land use permits also have recognized a protected right and followed a similar analytical approach. A substantive due process claim with respect to a permit denial will be stated if the "governmental action was arbitrary, irrational, or tainted by improper motive" in that it has "no relationship to any legitimate governmental objective. . . . " *Bello v. Walker*,

[25]The Court also has employed a due process standard which prohibits official misconduct which "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952) (action by law enforcement officers to pump stomach of criminal defendant for evidence). *Rochin* involved a criminal arrest. As such, the Court indicated that the norm would speak not to "squeamishness or private sentimentalism about combatting crime too energetically," but rather to "hardened sensibilities." *Id.* In the context of an arrest, where physical force is often necessary, the Court judges the reasonableness of the force used with "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving. . . . " *Graham v. Connor*, 490 U.S. at 397, 109 S. Ct. at 1872. *Rochin* sought to prohibit methods "too close to the rack and the screw" that "shock[] the conscience." 342 U.S. at 172. When addressing a protected right in the permit context, such a standard is not appropriate. And indeed, the Court has articulated a due process arbitrariness standard more appropriate for such circumstances. *See, e.g., Village of Euclid*, 272 U.S. at 395; *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223-25 (1985).

840 F.2d 1124, 1129-30 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988). *See also MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1558-59 & n.5 (11th Cir. 1991) (city's denial of property owner's building permit would violate substantive due process if plaintiff had a protected interest in the building permit and the government deprived plaintiff of the permit "' . . . for an improper motive and by means that were pretextual, arbitrary and capricious . . . ' " and, as such, that "necessarily lack[] a rational basis"), *quoting Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *Estate of Himelstein v. City of Fort Wayne, Ind.*, 898 F.2d 573, 577 (7th Cir. 1990) (city council's refusal to issue building permit could give rise to substantive due process claim if the council's action was "' . . . arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare' ") (*quoting* Seventh Circuit case law *citing Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926);[26] *Spence v. Zimmerman*, 873 F.2d at 253 (with regard to revocation of building permit, "substantive due process doctrine proscribes 'deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis' ") (citations omitted); *Brady v. Town of Colchester*, 863 F.2d 205, 212, 215-16 (2d Cir. 1988) (arbitrary or irrational standard met and substantive due process claim maintained where there is evidence that property owner was denied property interest in building permit not because of a good faith mistake about applicable law, but because of indefensible reason, such as political animus); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (interference with protected property rights was irrational and arbitrary, and thus, substantive due process rights violated, where city had no discretion to withhold permit and building official was required to issue permit because plaintiff met all requirements for permit); *Littlefield v. City of Afton*,

[26]The Seventh Circuit has expressed conflicting opinions on the issue. *See* n.38, *infra* at 28.

785 F.2d 596, 607 (8th Cir. 1986) (applicants for building permit stated substantive due process claim when they alleged the city acted arbitrarily and capriciously, with "no substantial relation to the general welfare") (citation omitted); [27] *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) (intervention of county's highest governing body into what should have been the routine, ministerial issuance of a building permit by the zoning administrator to an applicant with a protected property interest in permit supported allegations of " 'abuse of discretion [or] caprice . . . ' " upon which a Fourteenth Amendment claim was properly stated)

[27] *Cf. Condor v. City of St. Paul*, 912 F. 2d 215, 220 (8th Cir. 1990) (stating that the law is unsettled in the Eighth Circuit and elsewhere as to the parameters of substantive due process in zoning—not building permit—cases, although the "overall boundaries of substantive due process have been defined by the Supreme Court's decisions in cases raising claims of violations under 42 U.S.C. § 1983") (citations omitted)..

(citation omitted).[28] *Cf. Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (unanimous Court endorsed an analysis tantamount to the reasonable relationship test to determine

[28] Additional circuits that have not been faced with claims involving building permits have recognized that the arbitrary and capricious denial of other types of land use approvals, *e.g.*, zoning, also may implicate substantive due process. *See, e.g., Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991) (review of zoning decisions in the face of a substantive due process challenge is limited to whether the decision which caused the deprivation of a protected interest was "arbitrary and capricious") *(citing Euclid*, 272 U.S. at 395, *inter alia); Shelton v. City of College Station*, 754 F.2d 1251, 1255-57 (5th Cir. 1985), *cert. denied*, 477 U.S. 905 (1986) (arbitrary and capricious denial of zoning variance to a property owner with protected interest in real property, having no substantial relation to the general welfare, implicates the invasion of Fourteenth Amendment due process rights) (citations omitted). *See also Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407, 1409-10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) (government officials' destruction of plaintiff's property based on secret decision with no legitimate basis states a claim for violation of substantive due process because it is " 'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare' ") (*quoting Euclid*, 272 U.S. at 395, *inter alia*); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217-18 (3d Cir.), *cert. denied*, 488 U.S. 822 (1988) (allegation that city's denial of special exemption from zoning plan was arbitrary and irrational states a viable substantive due process claim).

The Sixth Circuit, which has not been faced with either building permit or other land use substantive due process claims, has concluded that the arbitrary and capricious denial of a liberty interest in a business license can give rise to a substantive due process claim. *See, e.g., Sanderson v. Village of Greenhills*, 726 F.2d 284, 286-87 (6th Cir. 1984) (even where poolroom operator had no entitlement under state law to a license, substantive due process guarantees operator's liberty interest to engage in legal business without arbitrary interference). *See also Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 312 (4th Cir. 1989) (if city council denied plaintiff's permit application to operate palmistry solely in an effort to "placate those members of the public who expressed 'religious' objections to plaintiff's proposed use of property, it thereby acted 'arbitrarily' and 'capriciously' " in violation of the Due Process Clause).

whether alleged state action was arbitrary, assuming *arguendo* a state-created property right in continued university enrollment protected by substantive due process).[29]

The well established precedent of *Nectow*, *Euclid* and the circuit court decisions that followed suggests two basic inquiries: (1) whether the objective underlying the state action is legitimate and (2) whether the state action represents a reasonable means of achieving that legitimate purpose. Applied to a permit scenario, a developer should prevail if he presented a case involving actions aimed at him that were unrelated to the merits of the application. *See, e.g., Bello v. Walker*, 840 F.2d at 1129-30. For example, the denial of a building permit may implicate substantive due process protection if the state officials improperly interfered with the process by which building permits were issued and "they did so for partisan political or personal reasons unrelated to the merits of the application for the permits." *Id. See also Brady v. Town of Colchester*, 863 F.2d at 216. Such actions "can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive

[29] Unlike the plaintiff in *Ewing*, PFZ had a protected right, *i.e.*, to use its property for a legitimate purpose. The Court's analysis of the alleged arbitrary conduct by faculty members in *Ewing*, nonetheless, may be analogized to that of the engineers in PFZ's case. The Court in *Ewing* observed that, when asked to review the substance of a *genuinely academic* decision, courts should show great deference to the faculty's professional judgment and not override it *unless* it was "such a substantial departure from accepted academic norms as to demonstrate that . . . " the responsible actor *"did not actually exercise professional judgment"* (emphasis added). 474 U.S. at 225. The parallels to PFZ's case are readily apparent. Respondents' decision was not genuinely on the merits of PFZ's drawings and there was no actual exercise of professional judgment with respect thereto. Accordingly, the court below did not need "to trench upon the prerogatives of the state," to find a substantive due process violation. *Id.* at 226. The *Ewing* Court also suggested that the concealment of non-academic reasons and bad faith may indicate arbitrariness.

due process violation. . . . " *Bello v. Walker*, 840 F.2d at 1129-30.

4. The Limited Impact on the Courts of Constitutional Protection of Land Use Rights

In the more than half-century since the decisions in *Euclid, Nectow* and *State of Washington* were announced, the recognition of a protected constitutional right to use one's property for a legitimate purpose has not opened the "floodgates" of litigation in the federal courts.[30] Similarly, the experience of the circuit courts demonstrates that the contours of substantive due process may be drawn to accommodate both protection against the arbitrary denial of construction permits and limitation of such claims consistent with the Due Process Clause.

A number of factors operate to limit the impact on the federal courts of the constitutional protection which has been extended to land use rights. The fundamental limiting principle is the reasonable relationship test of arbitrariness described in cases such as *Nectow, Euclid* and *Ewing*. Implicit in the arbitrariness inquiry is deference to state actions. As suggested in *Ewing*, this deference not only protects the integrity of the federal-state relationship embodied in federalism,[31] but also prevents the Fourteenth Amendment from becoming a

[30] Any fear of opening the floodgates of litigation has been contradicted by the practical experience of the federal circuits over the last decade, a majority of which recognize actions such as the petitioner's. *See also* Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. Dayton L. Rev. 313 (1991) at 351-59 (discussing the effectiveness of the Court's more recent efforts to cabin the scope of substantive due process).

[31] In addressing the deference to state action, the Court in *Ewing* was faced with an additional factor, not present in the instant case, which is the importance of safeguarding the academic freedom of state and local educational institutions under the First Amendment. *Ewing*, 474 U.S. at 226.

(continues . . .)

"font of tort law to be superimposed upon whatever systems may already be administered by the States." *Daniels v. Williams*, 474 U.S. at 332; *Parratt v. Taylor*, 451 U.S. 527, 544 (1981); *Paul v. Davis*, 424 U.S. 693, 701 (1976). The standard is sufficiently rigorous that its practical effect is to discourage landowners from bringing suit in every case where they are "disappointed" with a local land use determination.

In addition to the deference extended to state actors under the reasonable relationship test, there are several other factors which serve as a meaningful limit on substantive due process claims. For example, as alleged in PFZ's case, the action complained of must be deliberate. The guarantee of due process has been "applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. at 331. Lack of due care does not make out a deprivation by a state within the meaning of the Fourteenth Amendment, since such a standard "would trivialize the centuries-old principle of due process of law." *Id.* at 332.

Also, where state officials cause injuries in a manner indistinguishable from private citizens, constitutional issues generally are not raised. *Parratt v. Taylor*, 451 U.S. at 552-53 n.10 (Powell, J., concurring) (Mere "torts of state officials" are to be distinguished from "state action" taken "under color of state law"). Actionable deprivations must be based on " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . . ' " *Id.*, *quoting Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion of Douglas, J.).

(. . . continued)

Moreover, the Court here is not being asked to expand the federal courts' jurisdiction by creating a fundamental right for landowners. The right to devote one's land to a legitimate use free from interference by arbitrary state action has long been recognized by the Court. *See* discussion, *supra* at 14-15, regarding rights protected by the substantive component of the Due Process Clause.

In sum, the Court's measured approach to its role in land use issues does not diminish the federal courts' duty to intervene when a landowner's constitutional rights are infringed by local actions. *Brady v. Town of Colchester*, 863 F.2d at 215, *quoting Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). "Regardless of the deference normally accorded zoning practices by the courts, the Constitution does not tolerate arbitrary and unreasoned action." *Scott v. Greenville County*, 716 F.2d at 1420, *quoting Altaire Builders, Inc. v. Village of Horseheads*, 551 F. Supp. 1066, 1069 (W.D.N.Y. 1982) (citations omitted).

B. The Decision Below

1. PFZ Stated a Substantive Due Process Claim in a Protected Right

The essential allegations upon which petitioner relied to make out its substantive due process claim are sufficient to identify a protected right. *See* discussion, *supra* at 14-15. PFZ intended a legitimate use for its property, *i.e.*, the use approved by the Planning Board by formal resolution. The land use decision was upheld by the Puerto Rican courts. ARPE approved development plans based on that land use decision. Administrator Motta, respondent Rodriguez, and the Planning Board confirmed that the Planning Board's approval was in effect prior to ARPE's dismissal of the case.

Petitioner's allegations are also sufficient to state a claim for violation of its protected right. *See* discussion, *supra* at 15-21. PFZ alleged interference with its legitimate use of its property by individuals acting under color of state law. The Administrator of ARPE used the authority of his office to prevent PFZ's drawings from being processed, to orchestrate a sham review of the wrong drawings, and to dismiss petitioner's case.

Moreover, the state action alleged was arbitrary and capricious in that it was not reasonably related to a legitimate state objective. The Administrator of the Agency directed the deliberate review of the wrong drawings. There was and can be no legitimate, rational reason for such conduct. The action was taken to prevent the correct drawings from being processed and thus, to prevent PFZ from pursuing the legitimate use of its property described above. In no sense was this a proper objective for ARPE or Rodriguez.

Notwithstanding that these facts and allegations rose to the level of "egregiously unacceptable, outrageous conduct on the part of respondents in connection with their decision to dismiss petitioner's case . . . ,"[32] and notwithstanding allegations of misconduct involving the irrational action of deliberately reviewing the wrong drawings to "justify" a dismissal which deprived PFZ of its land use approval for personal and political reasons, the First Circuit could find no basis for a substantive due process claim.[33]

2. The First Circuit Committed Reversible Error by Not Recognizing PFZ's Protected Constitutional Right

During the past decade, the First Circuit consistently has ignored this Court's recognition that the right of private property owners to use their property for a legitimate purpose free from arbitrary state action is protected by the Constitution.[34]

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[32] Opposition to Petition for Certiorari at 27 (respondents' characterization of petitioner's claims).

[33] Paradoxically, the First Circuit has taken the more traditional approach when dealing in the context of state-created employment rights. *See, e.g., Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1989), *cert. denied*, 439 U.S. 1078 (1990) (censure of tenured professor reviewed to determine whether reasonable basis existed for merits of faculty members' decision). Its refusal to do so with respect to the protected rights at issue herein cannot be reconciled with *Newman*.

[34] *Compare* discussion *supra*, at 14-15 (Supreme Court precedent) *with* discussion *infra*, at 24-27 (First Circuit approach).

Instead, it has taken the view that claims involving arbitrary and capricious state actions which intrude upon such uses simply do not "rise to the level of violations . . . under a substantive due process label," and therefore, do not state a claim under § 1983. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d at 32. The First Circuit has further vitiated the constitutional protection afforded legitimate uses of property by indicating that a violation of substantive due process must be accompanied by the deprivation of a specific constitutional right[35] or allegations of invidious, class-based discrimination.

The First Circuit's rejection of PFZ's claims was based on a long-standing position articulated in its prior decisions in *Chiplin*, 712 F.2d at 1528, and *Creative Environments*, 680 F.2d at 829-30. Its reliance on these cases to justify the dismissal of PFZ's substantive due process claim is misplaced. Neither decision discusses the constitutional protection afforded to a landowner's right to pursue the legitimate use of his property. Neither cited or discussed *Nectow* or *Euclid*. Both decisions instead speak broadly to the view that the denial of a legitimate use of private property, even if malicious, in bad faith and for invalid or illegal reasons, cannot implicate substantive due process.

More specifically, *Chiplin* held that a due process claim alleging "that [the] denial of the permit [at issue] was improperly motivated, *unsupported by an allegation of the deprivation of a specific constitutional right*, simply raises a matter of local concern, properly and fully reviewable in the state

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[35] As indicated in *Chiplin*, 712 F.2d at 1528, either a fundamental right or one of the incorporated rights from the Bill of Rights must be implicated.

courts" (emphasis added). *Chiplin*, 712 F.2d at 1527.[36] The nature of that specific constitutional right was identified in *Creative Environments* and quoted in *Chiplin*. "A 'conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — . . . does not implicate the Constitution.' " *Chiplin*, 712 F.2d at 1528, *quoting Creative Environments*, 680 F.2d at 832 n.9. "Different considerations may also be present where recognized fundamental constitutional rights are abridged. . . . " *Id.*

The First Circuit seemed concerned about "maintaining a meaningful separation between federal and state jurisdiction . . . ," *Creative Environments*, 680 F.2d at 831, and that virtually every controversy involving a permit decision would end up in the federal courts. *See Chiplin*, 712 F.2d at

[36] State post-deprivation remedies are of no consequence in the context of substantive due process actions brought under § 1983. Substantive due process violations, unlike procedural due process violations, are complete when the wrongful action is taken. *Zinermon v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983. A plaintiff "may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these [substantive due process] rights" (emphasis added). *Id., citing generally Monroe v. Pape*, 365 U.S. 167 (1961). Thus, any suggestion that state post-deprivation remedies obviate a substantive due process claim is clearly erroneous.

In the procedural due process context, the existence of state remedies may be relevant. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*" (emphasis in original). *Zinermon v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983, *citing Parratt v. Taylor*, 451 U.S. at 537. Accordingly, the violation of procedural due process is not complete when the deprivation occurs, and it does not become complete unless and until the state fails to provide procedural due process. *Id.* In those circumstances where it is impossible to provide predeprivation process, the availability and adequacy of post-deprivation state remedies thus becomes relevant to a procedural due process claim. *See* discussion in *Zinermon*, 494 U.S. at 132-37, 110 S. Ct. at 987-89.

1527 n.4. Even if these concerns were significant as a practical matter, which they are not (*see* discussion, *supra* at 21-23), they do not justify a refusal to protect a constitutional right which this Court previously has recognized. The First Circuit no doubt was influenced in its approach by its erroneous view, expressed in *Creative Environments*, that a § 1983 claim for a violation of substantive due process did not exist "where a state has provided reasonable remedies to rectify legal error by a local administrative body. . . . " *Creative Environments*, 680 F.2d at 832 n.9.[37]

Not surprisingly, the First Circuit's approach to substantive due process in land use cases has been the subject of criticism by decisions in other circuits.[38] The majority of the circuits has pursued approaches to substantive due process claims implicating land use permits consistent with this Court's teachings. For instance, in *Scott v. Greenville County*, the Fourth Circuit found that a property owner's substantive due process rights were violated when the Greenville County Council intervened in what should have been the ministerial issuance of a building permit by the zoning administrator. The Council called a halt to the issuance of the permit for reasons unrelated to the merits of the permit application. *See also Bateson v. Geisse*, 857 F.2d at 1302 (city council's decision to withhold building permit although all requirements

[37] *See* n.36, *supra* at 26.

[38] The divergence of the First Circuit from the majority of other circuit courts was discussed most exhaustively by the Eighth Circuit in *Littlefield v. City of Afton*, 785 F.2d at 604-07. In *Littlefield*, the Eighth Circuit joined the majority and rejected the First Circuit standard following an extensive review of the split in authority. The court in *Littlefield* explained, "[w]e are persuaded by the *almost* unanimous decisions of our sister circuits that the denial of a building permit under some circumstances may give rise to a substantive due process claim" (emphasis added). *Id.* at 607. *Cf. Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990), discussed in n.27, *supra* at 18.

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had been satisfied was arbitrary and thus, violated landowner's right to substantive due process). The *Scott* court found that the landowner had a protected property interest to which federal due process protection extended, and that the intervention of the county's highest governing body, through its subordinate zoning administrator, into the routine issuance of the building permit was manifestly arbitrary and unfair. *Scott v. Greenville County*, 716 at 1418-19, 1421.

Similarly, in *Bello v. Walker*, the Third Circuit concluded that the landowner had presented evidence from which a fact finder could reasonably conclude that town council members improperly interfered with the process by which the municipality issued building permits. In *Bello*, like both *Scott* and *PFZ*, the state actors deliberately interfered in a ministerial process for "partisan political or personal reasons unrelated to the merits of the application for the permits." *Bello v. Walker*, 840 F.2d at 1129. The Third Circuit concluded that, if the facts alleged were proven, the state action could have

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(. . . continued)

The *Littlefield* court identified seven circuit courts, including the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh, which had disagreed with the First Circuit approach. These and more recent decisions are discussed *supra* at 16-19. Of these circuits, the Seventh more recently has expressed conflicting views on whether, in addition to alleging that a decision was arbitrary and irrational, there must be a showing of either a separate constitutional violation or the inadequacy of state law remedies. *Compare Estate of Himelstein v. City of Fort Wayne, Ind.*, 898 F.2d at 577 (property owner's allegation that city council failed to acknowledge rezoning of property and refused to issue building permit judged on a standard of whether the council's actions were "arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare") *with New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990) ("in addition to alleging that the decision was arbitrary and irrational, 'the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies' ") (citations omitted). The Tenth and Second Circuits, on the other hand, apparently have decided to embrace the majority view. *See Jacobs, Visconsi & Jacobs*, 927 F.2d at 1119-20; *Brady v. Town of Colchester*, 863 F.2d at 216.

"no relationship to any legitimate government objective" and therefore, would be sufficient to satisfy a substantive due process violation actionable under § 1983. *Id.* at 1129-30.

If, as the petitioner alleges, respondents' actions were deliberate in reviewing the wrong drawings; and if, as the petitioner alleges, the objective that was sought to be achieved by that state action was not a legitimate decision on the technical merits of PFZ's drawings, but an attempt to derail an approved project; then a substantive due process violation of PFZ's protected rights has been made out under the standards articulated by this Court and embraced by the majority of the federal circuits.

The Constitution does not just protect fundamental rights, nor are its protections invoked only by invidious class-based discrimination. Abuse of power and failure of state actors to discharge their authority in a rational means related to a legitimate objective will operate more subtly, but certainly no less offensively to constitutional sensibilities and traditional notions of fair play, in the context of a permit decision. The history of substantive due process counsels "caution and restraint. But it does not counsel abandonment. . . . " *Moore v. City of East Cleveland*, 431 U.S. at 502.

IV. CONCLUSION

The First Circuit's failure to recognize a substantive due process violation with respect to PFZ's protected right to pursue a legitimate use of its property, notwithstanding facially sufficient allegations of arbitrary, capricious and illegal conduct, is inconsistent with the teachings of this Court and the majority of the other federal circuits. The Court should reverse the decision below, consistent with the precedent suggested herein, and remand this case for proceedings consistent with its decision.

Respectfully submitted,

THOMAS RICHICHI
Counsel of Record
ALBERT J. BEVERIDGE, III
KATHRYN E. SZMUSZKOVICZ
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.,
Suite 700
Washington, D.C. 20005
Telephone: (202) 789-6000

JOSÉ LUIS NOVAS-DUEÑO
Suite 530, Bolivia 33 Building
Hato Rey, Puerto Rico 00917
Telephone: (809) 754-8300
Counsel for Petitioner